MEETING TO DISCUSS MATTERS PERTAINING TO THE CONTESTED ELECTION IN THE 13TH CONGRESSIONAL DISTRICT OF FLORIDA

MEETING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION

TASK FORCE FOR THE CONTESTED ELECTION IN THE 13TH CONGRESSIONAL DISTRICT OF FLORIDA

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

MEETING HELD IN WASHINGTON, DC, MAY 2, 2007

Printed for the use of the Committee on House Administration

Available on the Internet:
http://www.gpoaccess.gov/congress/house/administration/index.html

COMMITTEE ON HOUSE ADMINISTRATION

ROBERT A. BRADY, Pennsylvania, *Interim Chairman*

ZOE LOFGREN, California
MICHAEL E. CAPUANO, Massachusetts
CHARLES A. GONZALEZ, Texas
SUSAN DAVIS, California
Vacancy

VERNON J. EHLERS, Michigan
Ranking Minority Member
DANIEL E. LUNGREN, California
KEVIN MCCARTHY, California

LIZ BIRNBAUM, *Staff Director*
WILLIAM PLASTER, *Minority Staff Director*

TASK FORCE FOR THE CONTESTED ELECTION IN THE 13TH CONGRESSIONAL DISTRICT OF FLORIDA

CHARLES A. GONZALEZ, Texas, *Chairman*

ZOE LOFGREN, California
KEVIN MCCARTHY, California

ELECTION TASK FORCE MEETING TO DISCUSS MATTERS PERTAINING TO THE CONTESTED ELECTION IN THE 13TH CONGRESSIONAL DISTRICT OF FLORIDA

WEDNESDAY, MAY 2, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The committee met, pursuant to call, at 10:33 a.m., in room 1310, Longworth House Office Building, Hon. Charles Gonzalez presiding.

Present: Representatives Gonzalez, Lofgren, and McCarthy.

Staff Present: Liz Birnbaum, Staff Director; Charles Howell, Chief Counsel; Janelle Hu, Election Counsel; Matt Pinkus, Professional staff/Parliamentarian; Kristin McCowan, Chief Legislative Clerk; Robert Henline, Staff Assistant; Gineen Beach, Minority Election Counsel; and Fred Hay, Minority General Counsel.

Mr. GONZALEZ. Good morning, everyone. I am going to call the first meeting of the task force on Florida 13 to order. And first I would like to place everyone on notice that Congressman Lofgren, who is chair of a subcommittee—is that correct? And that you have a mark-up, so we are going to try to get through this, but if she needs to report to the other committee, then we are going to make some accommodation. But I wanted you to understand that that is the situation today.

The purpose of the meeting today is to answer the question of the next step for this particular task force, and that is, do we proceed at this point in time with the investigation of the election in Florida 13 back in November 2006? The chair will recognize himself for an opening statement of 2 minutes, and then I will go with Mr. McCarthy and then Ms. Lofgren.

It is a simple question in many ways and a difficult one, though, in many other ways. We do know that the undeniable facts that everyone can agree on is that there was an 18,000 undervote in Florida 13 that constituted 15 percent of the ballots cast, which is very, very unusual. I think everybody knows something went wrong. The question was, what was the culprit? What was the reason—ballot design, the electronic voting machine malfunctioning and so on? We are also very aware of the pending litigation in Florida. And as I speak, I have not been notified that there has been any resolution to the question that was posed to the Florida appellate court.

What is the proper role of this particular task force? And what is the prudent thing to do under the circumstances that we face this morning and today? My observation, of course, is simply that this task force has an independent and separate obligation and

purpose, separate from the judicial branch. Do we have precedent that basically the committee or a task force or any panel defers until the completion of any appellate review at the State level? You have some cases where that has happened. You have had other cases where that has not been the case. I think we are actually given free reign to make that determination that we believe will serve the best interest of the United States Congress and in particular the United States House of Representatives, which constitutionally is charged as being the final arbiter as to who will actually occupy a seat in that august body.

I would like to proceed today, of course, with the opening statements, and then we will get into a discussion. We were scheduled for today's meeting for 1 hour, and I would like to complete all action by then. But the first question truly is, what does this task force do at this point in time? Do we then initiate the investigation? Do we move forward? Or do we simply just have this holding pattern under which we have been operating for some time? With that, I will recognize my colleague, Mr. McCarthy, for his opening remarks.

Mr. MCCARTHY. Well, thank you, Mr. Chairman. And I appreciate the opportunity to give opening remarks. The question is, do we move forward? And you want to analyze from the perspective of what the Chairman said; inside Florida 13, there were 18,000 undervotes. There were also other races that had more undervotes. So there is a question, did something go wrong within there? If we look from what has gone further, we find that we have 433 members currently in Congress. They have all gotten here by having a certificate certified by the State. This is not the closest race inside the Congress. There were other races that were closer. The machines that were used, there were 11 other congressional districts inside Florida that use the exact same machines. And what did Florida do to look, to see, since the election took place, by certifying? They have had parallel testing. They did an audit with eight experts, Ph.D.s, looking within—having the source code, going through. I think from our meetings prior, we have found that Congressman Vern Buchanan, like all of us, shares the same presumption that each of us currently have, that we got here through our certification from the State, the background checks within.

I think much of the history comes back and shows that it is the design of the ballot as you go through and look at this. I appreciate the work that this committee has done. In our meeting prior to looking back, getting the experts in, we have had the opportunity even from other bills within this committee to have one of the experts, the Ph.D.s, that did the independent study that came through. I think Florida has done a tremendous job of analyzing from the parallel testing to the independent audit to get to this conclusion as we go forward. But I appreciate you calling this so we can look into this and have this debate. Thank you.

Mr. GONZALEZ. Ms. Lofgren.

Ms. LOFGREN. Well, I will be very brief. The threshold issue is whether we proceed further or not, and I am mindful that the House has an independent obligation to determine its own membership and the validity of contested elections under the Federal Contested Elections Act and also under the Constitution.

Having said that, that doesn't mean that we will—if we move forward—necessarily disagree with the state of affairs here in the House. I do note—and I would like to ask unanimous consent that it be made part of the record that, in the last Congress, the counsel for the committee, the House Administration Committee, sent a letter to the superior court of California, the County of San Diego in the Bilbray race, asserting that the State courts have no jurisdiction to act on matters.

[The information follows:]

U.S. House of Representatives
COMMITTEE ON HOUSE ADMINISTRATION
1309 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

(202) 225-8281
www.cha.house.gov

August 23, 2006

The Honorable Yuri Hofmann
Superior Court of California, County of San Diego
330 West Broadway
San Diego, CA 92101

Dear Judge Hofmann,

It has come to the attention of the Committee on House Administration that the Court is presented with a case, *Jacobson v. Bilbray*, No. GIC870044, contesting the election of Mr. Brian Bilbray to the office of Representative of the 50th Congressional District. The Court should dismiss this action. State courts do not have jurisdiction to decide an action contesting the election of a member of the United States House of Representatives. That power is textually committed to the House of Representatives itself by the Constitution, a commitment that has been recognized by the Supreme Court. The House of Representatives determined that Mr. Bilbray is the Representative of the 50th Congressional District, and redress is unavailable under the Federal Contested Elections Act. Accordingly, this Court should deny plaintiffs' request to recount votes and issue an advisory opinion about the results of the June 6, 2006, special election for Representative of the 50th Congressional District.

The United States Constitution unambiguously states that "Each House shall be the Judge of the Elections, Returns, and Qualifications of its Members." United States Const. art. I, § 5, cl. 1. This clause is a textually-demonstrable commitment to each house of Congress to determine that its members meet the qualifications enumerated in the Constitution. *See Powell v. McCormack*, 395 U.S. 486, 548 (1969) (noting that article I, section 5 of the Constitution "is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution"). One such qualification "expressly set forth in the Constitution" is that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. Const. art. I, § 2, cl. 1; *see also Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (stating that the analogous requirement that "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof" is a constitutional qualification). As a result, the Constitution gives the House of Representatives "the authority 'to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review." *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985) (quoting *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929)).

The House of Representatives has conclusively determined that Brian Bilbray is the people's duly elected representative from the 50th Congressional District. Under the Federal Contested Elections Act ("FCEA"), 2 U.S.C. §§ 381-396, a "candidate for election in the last preceding election claiming a right to such office" must, "within thirty days after the result of such election shall have been declared," provide to the contestee "written notice of his intention to contest such election." 2 U.S.C. § 382(a). Mr. Bilbray was admitted as a member of the House of Representatives on June 13, 2006, and was certified by the duly authorized official, the San Diego County Registrar of Voters, on June 29, 2006. As such, considering the statute governing computation of time contained in 2 U.S.C. § 394(a), such notice to Mr. Bilbray was due on July 31, 2006. No notice was provided, and no extension of time can be granted where notice is not provided within thirty days. *See* 2 U.S.C. § 394(c). As such, Mr. Bilbray's claim to the office of Representative of the 50th Congressional District cannot be assailed by Ms. Jacobson or any other person.

No relief this Court may grant could change the results of the June 6, 2006, election for Representative at issue in this case. When plaintiff asks this court to decree following a recount "[t]hat the candidate with the most votes be judged elected," plaintiff is asking the Court to issue an order that the House of Representatives is bound by the FCEA not to honor.

Further, this Court should refuse plaintiff's request to conduct a recount in order to provide an advisory opinion on the results of the June 6, 2006, election. In cases such as *Roudebush*, where a candidate contests an election through proper means, and there is a parallel state court proceeding pursuant to state law seeking to recount votes, Congress has postponed final determination of entitlement to the contested office. Here, however, none of Mr. Bilbray's opponents for Representative for the 50th Congressional District contested his election in the House of Representatives. Where no person with a claim to the office has sought to contest the election, the House of Representatives strongly believes that concerns of federalism dictate dismissal of any action to recount ballots. Our constitutional structure is not well served by having courts question the results of an election, the outcome of which all candidates have acceded.

Thank you very much for your consideration.

Sincerely,

Paul Vinovich
Counsel

Cc: David A. King, Esq.
Kenneth L. Simpkins, Esq.
Paul R. Lehto, Esq.

Ms. LOFGREN. Now, I put this in the record to say, you know, it is one extreme because I don't believe that is the case. The courts do have a role, but it has been 6 months now. We don't have a decision, and I think we need to sort through what happened. The 18,000 undervote far exceeds the margin of victory of our colleague Congressman Buchanan, and we don't know whether we will be able to find out what happened. But I think we need to try to find that out, honestly. I will say that I take the obligation of serving on this committee very seriously. I served on the Ethics Committee for eight years, and this is a similar type of obligation where you cannot act as a partisan. You have to act in the interests of the institution. And I will say, in the eight years that I served on the Ethics Committee, with the exception of one minor procedural vote, we had nothing but unanimous votes because all of us took that responsibility for the institution very seriously, and I do that in this obligation as well, and I am hopeful that whatever we decide today, that we will move forward in a way that is nonpartisan, that is fair and that keeps in mind our obligation under the Constitution and to this institution. And I appreciate being recognized for those brief comments, Mr. Chairman.

Mr. GONZALEZ. Thank you very much, Ms. Lofgren.

We will be operating under a 5-minute rule. It does not mean that we won't have a second round of 5 minutes and such. But I was explaining this yesterday. I think all of us as Members of Congress once in a while are invited to be judges of high school debates many times, and the participants in the debate never know which side of the arguments they actually will be debating. And I actually like to proceed under that fashion. In other words, if we look at both sides, if we were proponents of not moving forward and if we were proponents of moving forward, and analyze it in that particular light. From the beginning, my big question, of course, has always been, if you are the contestant, the burden of proof rests with the contestant. At this stage, and after all these months, and I guess now the Florida appellate court has had the case pending for probably approximately 120 days or so with no resolution on a discovery point. There has been parallel testing, but it was at the direction of an interested party, and that has always been my biggest concern. And that is one part of the argument. What is gained by simply not moving forward at this point in time? Well, we could let the Florida court resolve it, send it back to the trial court and any of us that are familiar with court proceedings understand the cost that is involved and, further, the time that is going to be required to—if in fact the appellate court directs a trial judge to allow the contestant, in that case, the plaintiff, to conduct their own testing under certain confidentiality requirements on trade secrets. I have never been involved in any proceeding where an interested party to a lawsuit is the only party that is allowed the direction of the testing, the selection of the experts and so on. As a general rule, both sides would get that opportunity, and in a final analysis, if the court is truly confused by the conflicting testimony of the experts, you do bring in someone to assist you. I am not real sure when you take up the proposition that we do nothing of where that gets us. There is an open question today. When I was a young person, and I went to the State senate to watch my father, and we

would go to the University of Texas, which I eventually attended, inscribed over the threshold is, "And the truth shall set you free." and I remember the discussions with my father, and I said, if the truth should set us free, why are you filibustering against Jim Crow segregationist laws? And what he told us many times, the truth that we seek is only to remove doubt, to give some certainty so that you move forward. And that is the way I view the role of this task force. What is to be gained if we move forward without specifically indicating in what manner? Because that is the second question. I think some resolution, and what we set people free from will be free of doubt and free of uncertainty.

The election took place in November 2006. We are now into May. It is a 2-year term. My position is simply, I don't see what is to be gained by delay, but I am still open to an argument as to why that would be advantageous and beneficial to the House of Representatives and of course our obligation as a task force with this particular committee.

Ms. LOFGREN. Mr. Chairman.

Mr. Chairman, could I offer a motion, and then we will debate this? Because the threshold question is whether to proceed; and then, if we decide to proceed, how to proceed. I would move that the task force initiate an investigation of Florida's 13th Congressional District election.

[The information follows:]

ELECTION TASK FORCE MOTION #1—INITIATE AN INVESTIGATION

MAY 2, 2007—ADOPTED BY VOICE VOTE

(Offered by Zoe Lofgren)

I move that the Task Force initiate an investigation of Florida's 13th Congressional District election.

Mr. GONZALEZ. Okay. Well, the motion on the floor then obviously addresses that first question. And I would yield to either of my colleagues.

Ms. LOFGREN. If I may speak in favor of the motion just briefly, and I do want to hear from our colleague, Mr. McCarthy. There has been some review of the code. We are aware of that. But there is additional testing that has not been done, and that is the point of contention in the Florida court on what amount of testing can be done. It seems to me that since it is May 2 and this election happened in November, that it is important to—as the Chairman has said, to reach a conclusion on this matter. This is a 2-year term and we are 6 months past the election time. I have had a chance to review the precedents and to note that the Congress has not routinely deferred to State courts when there was a contest. And in the case of the 105th Congress, Dornan v. Sanchez, there was no State judicial action. In Young v. Mikva, the House proceeded even though the Illinois Supreme Court was pending. And it is very clear that, although State courts can sometimes be of value to the Congress, it is not a presidential requirement that we wait forever for courts to act. I would hope that if we proceed, if this motion is successful, that we might develop protocols and get whatever additional testing is done and reach a conclusion if all goes smoothly very promptly. I think in the briefing that we attended, there was a proposal that all of this could be done in 45 days if things go

smoothly. And obviously, I think, if that could happen, that would be a very good thing just to be able to get some dispassionate review of this and resolve it and get it behind us would be I think the right thing to do. So I don't think there is any additional purpose to defer to the State proceedings. There is no indication that they are going to act. They have not acted yet, and the action is actually a procedural motion that proceeds further action. And so, therefore, I think this is the right thing to do. It is a wise thing to do. And I think, in the end, if this motion succeeds, I will have an additional motion that I hope would get the support of every member because this has got to be done properly, and I thank the gentleman for yielding.

Mr. GONZALEZ. Mr. McCarthy.

Mr. MCCARTHY. Mr. Chairman, if I could first ask a couple questions without taking the 5 minutes from the standpoint of just some personal inquiries, one that I had asked from the last meeting we had. Just to clarify, because creating this ad hoc committee, at times we use different phrases, and letters that I have received and knowing I am just a freshman, I just want to make sure. Ad hoc and task force are the same words, is that correct, from the standpoint——

Mr. GONZALEZ. My understanding——

Mr. MCCARTHY. Definition-wise.

Mr. GONZALEZ. The letter that created this particular body refers to it as a task force, and so I have continued using that terminology. We could call it an election panel and so on or ad hoc panel. But my preference is we call it a task force only because our beloved past Chair Juanita Millender-McDonald, that was the term that she used in her letter, and I would like to keep to that. So, legally speaking, I think your question really goes to——

Mr. MCCARTHY. I am just trying to redefine. Do actions taken here, do we go back to the full committee? Or this is the empowerment of this? This is, under rule XVI, created?

Mr. GONZALEZ. Ms. Lofgren.

Ms. LOFGREN. My understanding is we have been empowered as a task force. And I think they use the task force nomenclature in the Dornan-Sanchez race as well to make this decision. I mean, we can—if you convince us, we can vote no on the motion I have just offered, but we are empowered to proceed or not to proceed, and if we proceed, empowered to decide how to proceed under the rule and following the precedence of the House.

Mr. MCCARTHY. Okay. Just for clarification. And then I know we had talked at one time, maybe we would just have legal counsel, just as we move forward I guess.

I guess, I would then get to—just one other personal inquiry if I can. When you say this motion, I move the task force to initiate an investigation, for a definition of investigation, you refer to a little later that, if this were to pass, then we would decide what investigation meant; is that correct?

Ms. LOFGREN. Well, I am going to—if this motion is approved, I am going to make a further motion about how to proceed that would involve a dispassionate entity assisting us.

Mr. MCCARTHY. Okay. Now I will be on my 5 minutes, I guess, to debate the first question.

I come to this committee from the standpoint that I think we do have the institution and the respect of the institution to keep the responsibility there, that this is not to be political on any basis. So I never want to derive from a political predetermined position. And the question that we had was, do we move forward? So, from my perspective, I had to sit back from our last meeting where we have had both entities that had representation lay out their points. And when I sit and look first that you have a race, that you have 18,000 undercounted votes. I look within that ballot; there is an attorney general race in there that had more. Then I asked the question, did anybody else use these machines? There were 11 other congressional districts that used these exact same machines. One being one district down with a new member, Mahoney, that was a close race; not as close as this, where the opponent's name wasn't even on the ballot. So I raise the question, what did the State do to certify these? Because when we go in that day and raise our hand and everybody gets sworn in, just as Congressman Buchanan was, was there anything done to analyze this because the undercount raises a question that people should look at? Doing the parallel testing, which the State did, where they take the machines and go and test, I raise the question, which machines did you use? I asked the question to Ms. Jennings' attorney, were they actually able to select some of the machines? I asked the same question to Mr. Buchanan's counsel, and they didn't select any. They just allowed the process to pick. Then I raised the question, well, did you select the machines that had the undercount in the highest precincts and others? And the answer was, yes. So that was one test that—okay, so we went further. But then there was the question that was raised, but you need to know the source code. And that is part of the argument, through the source code, could somebody break in here? And then I look to, what did Florida do? Florida went out and got eight experts to analyze the source code, came back with a unanimous decision within there, and in the parallel, testing nothing showed a problem and said there was not a problem in here.

Now we did not have before us in the last meeting any of those eight individuals that could be here, that did the audit. And you had raised the point just a little earlier that the State is doing this, and the State is part of the lawsuit. So the argument on the other side was, we didn't have an opportunity to pick the individuals. So we had an interesting situation, though. In one of our hearings that Ms. Lofgren had on H.R. 811, one of those experts was here, and I raised the opportunity because he was here. His name was David Wagner, and I was able to ask him if he had the source code, and he said, yes. And what was interesting, there was another individual here Mr. Zimmerman that represented an entity that is part of a lawsuit now within this. I think the lawsuit is Fedder v. Gallagher. And what was interesting in this conversation we took, and I have the transcripts here, I asked Mr. Zimmerman what did he think of Mr. Wagner? Just thinking, okay here is an independent, did the State go out and pick people? And Mr. Zimmerman who is in a lawsuit against him there said, I think he is a very fantastic scientist, who I go to for information from time to time. So then it raises the question that if these—these were inde-

pendents, and even if somebody had a choice on the other side, they probably would have selected this individual.

I mean, when I looked at the different races, and I looked at one in Connecticut that only had 80 votes, I still haven't found from what the State has done, parallel testing, releasing the source code in that manner and doing the audit, that I haven't found any evidence that there had been a problem. You can say from the aspect of having the undervote and also in the attorney general race that there was a ballot design problem. But I am trying to take it from the perspective, I have to make a decision based upon the evidence. From the same aspect that it has been a while, those constituents have a right to be represented. They have a Congressman sworn in. The State has gone through the process. If something has shot up through the parallel testing, rightfully so, go in. If in this independent audit, if one of the eight had said, I disagreed, I would have said, well, let's probe there a little further. If Mr. Zimmerman had said, that Mr. Wagner, he is always on this other side, I would never use that man—actually hires the individual and believes he is a great scientist. Then we had another Ph.D. there that had nothing to do—didn't do the study or anything else. And I asked him the question, and then I probed further, have you read the study? And he said, yes, and he said it is probably one of the most thorough ones I have ever read. So analyzing what is before me, do we go through an investigation which has its own ramifications and we—having the respect of this House and maintaining it, that everyone gets here and gets certified going in, the State doing parallel testing doing an audit with outside entities, with scientists looking at the source code and no evidence before us saying there is a problem with any of those investigations, I would have to argue that I think there has been an investigation. There has been tax money used. They have looked at the machines. They actually took the machines that had the highest undervote count in the worst precincts that the opponent got to select and not one evidence came forward. So from that perspective, are you doing a disservice to the constituents? Are you doing a disservice to Congressman Buchanan, trying to put—from that perspective? I think this House—and I appreciate being able to have that last meeting because I thought you handled that the correct way, bringing both entities in and just having them lay out, one, their arguments, got to have the question before, should we move forward? If you move forward, what would you do? And I am just saying from gathering that information, hearing what is before us, we have had an investigation. I think it is time to move on and let the constituents continue to be represented.

Mr. GONZALEZ. Thank you Mr. McCarthy.

Mr. MCCARTHY. So I officially ask for a no vote.

Ms. LOFGREN. I would just say a couple of things. In the briefing, we were able to review many affidavits from voters who reported that their votes were not tallied. Now, in looking at the review that was made, what has been clear is that it was not a complete review. Mr. Wagner from the University of California I think has acknowledged as a very able scientist—I mean, no one has suggested that he is not, and I do not. The issue isn't about him. It is about the scope of his review. And as my colleague from California

knows, the scientists, the computer scientists from Stanford University across the Bay from Cal have suggested that the review needs to be broader than was engaged in. And I believe that that is, in fact, the case. I also believe that this review, which has really been stymied by the courts in Florida, can be accomplished very promptly. I think it should be. This has gone on too long. And I think we need to move forward. I think we need to adopt this motion.

I realize that the gentleman disagrees on this, and I do respect that. But I am hopeful that, if this motion passes, that you will agree on how to proceed because we need to do this transparently and fairly, and that is my commitment. And I yield back.

Mr. GONZALEZ. Thank you very much, Ms. Lofgren.

My own impression of the briefing that we had, of course, was the excellent job that the lawyers did, but there was—well, the materials we received from the contestant contained an affidavit by I think two Ph.D.s, one was from Rice and I forgot the other—that in essence, did disagree with the manner and method or protocols that were utilized in the testing. So I don't think that you have unanimity as to the validity of the manner or method of testing. And I still go back to something I think it is fundamental. The contestant does have the burden of proof. The contestee has a motion to dismiss pending before this task force, this committee before Congress. Somewhere down the road, we have to make a recommendation to the whole committee. The same parties that resisted allowing the plaintiff in the Florida case from following through in conducting the tests according to what they thought were the appropriate standards in order for them to meet their legal standard still believed that it was a legitimate exercise and undertook it themselves. And I think that is where we are today.

The problem is, again, those individuals that did the testing and the manner in which was basically dictated, approved and directed by one side. And I don't believe that that is probably the best way to reach some sort of conclusion, that if you are from the outside looking in, you would say that is a fair process. I think that is the fundamental question for me. And how do we accomplish that? And of course, that is not something that we get into right now. But definitely I think we all have something in mind based on what was shared with us at the briefing which was about two and a half hours and was truly enlightening. My sense is that we move forward, and we can discuss in what manner and going into the specifics that Ms. Lofgren has already touched on to some extent. At this time, I would yield to either of my colleagues if they have anything that they wish to add at this point before we would take a vote.

Mr. MCCARTHY. The only thing that I would add—I know you raised the point that one side—that a study was done by one side, but let's look at elections. We elect secretaries of States to be the independent when it comes to the election. When you refer to the other side, that is not Congressman Buchanan doing it. That is who the people chose to be the independent person. Now if you have a disagreement from the process, you have to challenge the secretary of State, but I believe the secretaries of States are independents. As you go across this country, you will find that because

they are the ones that certify all elections across the board. So I understand your argument, but I don't believe that that is just in the process that that is who the people select to be their independent counsel. They don't go to, okay, we certify opponent A as the winner, so they got to go select who these independent Ph.D.s were who went to go do this research. To me, they are independent. To me, they were the people entrusted by the State of Florida to look at it in a nonpartisan manner and come to that conclusion. So I mean, I just disagree with that argument. Now, had a parallel test shown something wrong, let's go move forward, had an independent audit, or had Florida not done either of those; yes, I think the undervote determines that we should look at it. But if they have tested it and have gone through it, what more could you do then with it?

Mr. GONZALEZ. And I understand, and I don't mean to cast aspersions on any elected official or election official in Florida. I think my fundamental issue comes down to that you have someone who has a vested interest in the outcome of the litigation, and that is problematic to me. And I know that they will proceed in the fashion that they believe is fair, but nevertheless it is going to lack something, but the opposing party who also has a vested interest, there is a way of actually addressing those competing interests. And to the extent that, at least appearance-wise, it would not appear fair to allow and to vest all the authority into only one of the parties to litigation, they do have a protectable interest. And it may be reputation. It may be policy. It may be politics, all of that. And I think if we can somehow remove that part from this equation of trying to gain the truth as to exactly what happened that day, did the machines malfunction and so on, by allowing a process that removes that specter of an interested party of someone with a vested interest again. And I think that is my biggest concern, and it has been from the beginning. And I think the individuals have addressed it well, and I know that Mr. McCarthy and I, as well as Ms. Lofgren, have had informal discussions early on. I know that staff has looked into it way before we have started getting formally engaged in the process. Ms. Lofgren, do you have anything further?

Ms. LOFGREN. No. I am advised that actually after our colleague Ms. Harris left the position as secretary of State, it actually became an appointed position. But I don't think that changes the argument. I just am—I think we need to put this to rest, and I don't want to unduly delay this debate, but I do think that, you know, we need to find out whether we can find out what happened, and I would yield back before the Chairman——

Mr. GONZALEZ. Ms. Lofgren, do you have a motion?

Ms. LOFGREN. The motion is to move that the task force initiate an investigation of Florida's 13th Congressional District.

Mr. GONZALEZ. Call for a vote. All in favor will answer aye.

Ms. LOFGREN. Aye.

Mr. GONZALEZ. Aye. And all opposed, nay.

Mr. MCCARTHY. Nay.

Mr. GONZALEZ. The motion carries. And as I pointed out and I think Ms. Lofgren also touched on and we have had these discussions when we had the briefing and such, if we moved forward, what would be the parameters? What is it that we seek to accom-

plish? And I think we have touched on the fundamental question of which is the most expedient, fair, complete manner of proceeding. There has been discussion because we lack the expertise, obviously, and the staff to bring in an entity, an agency, an individual, an expert to assist us in this particular endeavor. And then allowing that individual some latitude, but in real questions, that may arise regarding the protocols the individuals and so on, and working in conjunction with the attorneys, by the way, if there is a question that still it would be up to the chair working in consultation with the members of the task force to resolve.

But I think the first issue is, where are we going to go at this point in time? I would like again to direct our attention to seeking the assistance of someone, again, an agency, department, an individual, and we have already had this discussion somewhat during the briefing. And I do want to welcome our colleague, Mr. Lungren, and we will be following the rules of the committee. You are a member of the full committee, so you will be able to participate. Of course, you won't be able to vote.

Ms. LOFGREN. Mr. Chairman, I would like to offer a motion.

[The information follows:]

TASK FORCE MOTION #2 (AS AMENDED)—HOW TO PROCEED

MAY 2, 2007—ADOPTED BY VOICE VOTE

(Offered by Zoe Lofgren)

I move that the chairman be authorized and directed to secure the assistance of the Government Accountability Office, which shall be requested to design and propose testing protocols to determine the reliability of the equipment used in the FL–13 election, taking into account recommendations by the contestant and contestee. The Task Force shall approve any testing protocols prior to execution by the GAO. The GAO may procure such expertise and assistance from governmental or non-governmental experts and entities as it deems necessary, and shall report its findings to the task force.

Mr. GONZALEZ. You may proceed.

Ms. LOFGREN. I move that the Chairman be authorized and directed to secure the assistance of the Government Accountability Office. The GAO shall be requested to design and propose testing protocols to determine the reliability of the equipment used in the Florida 13 election, taking into account recommendations by the contestant and the contestee. The Chairman, after consultation with the task force members, shall approve any testing protocols prior to an execution by the GAO and that the GAO may procure such expertise and assistance from governmental or nongovernmental experts and entities as it deems necessary, and shall report its findings to the task force. If I may speak briefly in support of this motion, the Government Accountability Office, as we know, is independent. It is a part of the legislative branch, but it is not a partisan organization. And in fact, they fight quite jealously to be independent of the House. They are objective, and they have expertise that we do not have. So I do think that their involvement will make sure that the analysis is done in a completely nonpartisan way.

As for the contestants, I would note that Ms. Jennings' counsel suggested basically competing experts and that each party be granted the right to have discovery, and I don't think that is the right way to proceed, frankly. We will just end up with competing

experts, and we will still have the lack of expertise that we need to proceed. So I think to allow the contestant and the contestee to make their pitches to—if you will, to the GAO, is appropriate. They obviously both have a great interest in the outcome. But the GAO should decide how to proceed in terms of the testing protocols. I would note that the Chairman needs to be empowered to approve the testing protocols but that he also needs to be required to check in with the task force. And it is my expectation that the Chairman, if there were minor issues, obviously he is going to consult with us and proceed.

If there is actually a substantive issue, I would expect that he would come back, and we would have a formal vote. And I know the way the Chairman has proceeded so far is fair and dignified, and that has been recognized by all the members of the committee. And I know that he would proceed in that way.

Deputizing the GAO to use outside experts is another important element. I would note that there have been some discussions about what role NIST should play. And it is interesting. I recently—I have never met with the Director of NIST, and I didn't do it for this purpose. As Mr. McCarthy knows, we have been trying, wrestling with the issue of the voting machine bill. And there was a suggestion that they play a role in software, which they didn't want to do. And so, Mr. Holden, I met with him to see, you know where did they see themselves in the voting machine bill? And it became very clear as we—they are not—they are not a regulatory body. They are going to run away from anything that involves just setting standards. That is what they do. And they are right because everybody trusts them because that is all they do. And I would not want to disrupt that role for them.

On the other hand, if they are asked by the GAO to do something that is within their purview, they can do that. And that is why, you know, I—there was some informal discussion that NIST should play the lead role. They can't do that. They don't want to do that. But this allows them to be—to play their appropriate role, and I would expect that the GAO would, in fact, involve them in an appropriate role.

Finally, I know that the minority thinks that we should not proceed. But if we are going to proceed, and we voted to do so, I think this addresses the issues that have been discussed and guarantees that we will proceed in a way that is dispassionate, that is informed by expertise, and that is not a partisan endeavor. And that is why this motion is crafted as the way it is. And I am hopeful that we can all support it. And with that, I would yield back to the Chairman.

Mr. GONZALEZ. Mr. McCarthy.

Mr. MCCARTHY. I agree with you from the standpoint, I didn't like the concept that both parties went and did their own investigation because, well, you know, Mr. Chairman, being a judge, you can get anybody, and we are going to end up going nowhere. On reading this, I have concerns. But I think there is a place that we can get to that—and I would hope, too, that we move in an unanimous basis going forward. Yes, I disagreed with doing the study because I haven't seen the evidence. Having said that, we did bring up NIST. I also think the National Security Agency could do part of

this, too, and maybe do some of the research, NSA. And I will tell you that somebody at NIST gave that idea because they are in America's cryptological organization to coordinate, direct, perform highly specialized activity. There are some very good experts. I mean, they are protected from that standpoint.

I would say, based upon our argument prior, wouldn't our first action be—if we have a disagreement about the audit, I mean, if I took our last debate, the majority believes that the audit, the scope was not correct. I believe from that perspective that it was. Now, none of us have the expertise of the NSA or them or maybe even the GAO. I would believe our first step, why would we have the GAO analyze that audit because that would come down to what the whole argument being, one entity from Stanford said, you didn't have it all the way. You had eight experts, Ph.D.s, that said this was all fine. Why don't we first take the GAO? If they need expertise, that they can communicate to the NSA and to NIST, to analyze the audit first. Because this is what I am thinking, I am thinking down the road. Whatever happens I would hope, at the end of the day, it would be unanimous no matter what the end of the discussion would be, because I think that is for the institution. On a national—if I look back on this in history, you wouldn't want to always—I believe the Chairman has a right to do things, but you want to make sure you give them full authorization. This committee is small. I think we need to move forward in those steps. And I would feel very comfortable with you coming to me on the Floor and saying, oh, we are doing this. If there was ever some type of disagreement, we come back with a vote. But if we took the GAO, just to come back to that, on a timeline basis because if you are going to come up with standards and go through everything, we could be here another 6 months or a year. But if they analyze that, you also—say they come back and they say these standards, they take your position, these standards are wrong, you would have to maybe come up with the testing protocols if we had to move forward. But if they came back and said, this is all correct, our answer may be there as well. So I don't know if I would offer a friendly amendment to scope this down, giving the GAO the power, the Chairman to go to the GAO, the GAO has the right to go to NSA, to NIST that they see experts to analyze the Florida audit from their procedures and what went forward.

Would that be acceptable?

Ms. LOFGREN. Well, if I may——

Mr. GONZALEZ. Ms. Lofgren.

Ms. LOFGREN. I think that the final paragraph of the motion authorizing the GAO to procure such expertise and assistance from governmental or nongovernmental experts and entities as it deems necessary would include the NSA if they think that is necessary.

Mr. MCCARTHY. That is fine.

Ms. LOFGREN. So we don't need an amendment. I never thought of that, honestly. And I must confess I am a little skeptical that the NSA would want to do that. But if that is—if the GAO thinks that is a good thing to do, fine, I don't have an objection to that.

As to the review of what has already been done, I think that clearly is within the purview of this, and I expect that they will do that. But I also expect that they would do protocols for the addi-

tional testing that has been asked by the contestant. If we were satisfied with what has been done, we wouldn't be proceeding. And so, you know, if they come back and say, we, you know, we have looked at it, and this is all we need to do; that is the report we are going to get. I know that, because they are independent, they are going to tell us what—they are going to call it as they see it. And that is the beauty of having the GAO do this. So I hope that that satisfies the gentleman.

Mr. GONZALEZ. Mr. McCarthy, if you want to respond.

Mr. MCCARTHY. Yes, the only thing I would say, moving forward, I can't agree to what this is because the scope is narrow. I mean, the argument—I am trying to take what I heard earlier, why you came to the conclusion from—different from the conclusion I had where I didn't see any evidence. The Chairman's argument was, he raised the doubt because the Secretary of State was the one being sued, and they selected the individuals. And then you raised the debate inside the meeting that we had prior that—from a Stanford person. So I thought we were kind of at this point and this point being said, GAO being viewed as an independent entity being able to look for experts on the outside, who have greater expertise than we do on how they analyze, these Ph.D.s and others going through, looking at what the State had done. Shouldn't we first—if we had doubt of whether the State was right or not in that procedure or whether those were independent, which the question you raised, wouldn't that answer that question?

Mr. GONZALEZ. And I will respond. You still have the problem that I think I pointed out from the beginning. And that is, you have the contestant who has the burden of proof who is requesting specific testing in order to meet that burden. And that testing incorporates protocol or a manner that is different than what has already being conducted. I don't disagree with you that I think GAO is going to be looking at the large body of evidence that is already in existence. And there is no doubt in my mind that the contestee's attorney is going to make a very strong, strong argument to pretty much restrict GAO's role to reviewing what is already in existence, passing some sort of judgment and then keeping to a bare minimum what might be some additional testing. That is what—I mean—that is what I think are the arguments that are going to be taking place at GAO, and I think GAO is probably going to put something together, and they will come back to us because, in the final analysis, we really have to look at that protocol and take the arguments that have been advanced, and then they move forward with whatever we decide. So I think what you are suggesting still leaves unresolved, and that is the central question, is the best thing is you have an impartial neutral party that has the resources and the expertise? And they don't have the authority to go out there and bring those individuals into this process and go beyond that which is already in existence, which one party, the party that has the burden has found insufficient for the purpose of their evidence gathering because, eventually, they are going to have to still make their case to us on the motion to dismiss that is pending as filed by the contestee. But I do want to recognize Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman. I appreciate your courtesy, and I sort of feel like an alternate juror here. It is

kind of difficult when you only have one on our side, and if he is unable to participate for me to come in without knowing things. So that is why I am trying to attend these. I am sorry I was late. I was over in Judiciary where we have to get back to I know.

Ms. LOFGREN. Did they take up my bill yet?

Mr. LUNGREN. No. No. We are still on the COPS bill. I think I was the only dissenter on that. And I know we are not supposed to refer to the transcript from the business meeting that we had, but at least I think I can say that I was the one who brought up NIST because it seemed to be a good idea at the time. Since that time, we have discussed with NIST as well, my staff has, in some extended conversation with them, and something we learned from that goes to I think the issue that is before us. When we talked with NIST, they talked about, they were to do a study—if they were to do a study, it would take something like 15 man years to do something, what we were talking about doing with the source code analysis and so forth. That suggests to me it is going to take a long period of time if the source code is ever allowed out, as I understand the company has fought against that, except to allow it to go to the bipartisan or nonpartisan or whatever you want to call that panel down in Florida.

So if that is the inevitability that it is going to take a long period of time, and the gentlelady from California suggests we would like to get this thing wrapped up in a reasonable period of time, that might suggest that that is impossible if that is what the ultimate requirement of technical analysis is. That is why I think the gentleman from California's comment about at least making it clear to GAO that they should look at the Florida report to see if it does give them a body of information upon which they can render a judgment makes sense. That might allow us to get some answers within the time frame the gentlelady suggests or somewhat beyond that as opposed to saying these answers can only be ascertained after these 15 man years, or whatever that means, down the road where we are going to be sitting here 18 months from now on the eve of a new election trying to decide what happened here. So I guess from my observation as the nonbinding party to this hearing, we should make it at least clear to GAO that what the gentleman from California said is within their purview and may even be a priority for them because it may give us some guidance earlier than anything else we can see because I think all of us on the full committee and in the full Congress want this thing resolved within a reasonable time frame. And after our conversations with NIST, I was concerned that, oh, my God, not only don't they want to do it, but they are saying, technically it would take—in my terminology—forever to do. We would never get to the definitive decision we have to make. So I would just offer that. The gentleman from California has raised a prospect to what GAO might be able to do. It may very well be the way for us to at least get guidance as to whether we could make a decision within a reasonable period of time.

Mr. GONZALEZ. Ms. Lofgren.

Ms. LOFGREN. I would just say this, that the contestant is not going to be empowered to do discovery under this motion. They are going to be empowered to ask an impartial entity to consider their

request to do a particular form of testing that is recommended by scientists at Stanford University; that they believe, according to the Stanford scientists, it would take about 45 days if all things went smoothly. I don't know. I am not a computer scientist. But I think that—I hope that this can be done in 45 days. If the gentleman is right, and it takes, you know, 2 years, well, you know, we will be in a very different—Mr. Buchanan will never face a vote of this committee and nor will Ms. Jennings. So we can't know that now because none of us can predict the future. But I would just say, it is my—I am not going to change the motion. But it is my anticipation, my belief that we can put it in a committee report if there is a committee report. The GAO, as its first order of business, is, they are going to take a look at what has already been done. And of course they are going to do that. But we also expect that they will do—allow the contestant to have some kind of dynamic testing that has not yet occurred, and then get back to us and then give us a report. And I expect whatever the report is, it will be unanimous, I mean, when we accept it. I don't think—this is not going to be a politicized endeavor at all. And I don't want that, and I don't think you want it, and I don't think the Congress needs that. And I would thank the gentleman for yielding.

Mr. GONZALEZ. Mr. Lungren.

Mr. LUNGREN. I may be the only one here who was here in the 1980s, and I just don't want us to revisit that sorry situation because it did poison this House and changed the dynamic in the House of Representatives for the rest of the time I was here. And I don't think we want to repeat that or get even close to that. So I thank the gentlelady.

Mr. GONZALEZ. Mr. McCarthy.

Mr. MCCARTHY. Yes, Mr. Chairman. Having heard that and looking back, I guess if we are going to look to history, I would only raise this issue, and I would ask that you take it as a friendly amendment or I will offer it as a motion after this, that the testing protocols are subject to the task force approval, because the way I read it here, we empower the Chairman and authorize them, and in the end, you are empowered to do the design and propose the testing protocols. So we are setting ourselves up for, in the next meeting, "well, I didn't get a look at it." I am just thinking trying to take arguments away. I just think that, from the design and proposed testing protocols, that that is a committee, and knowing that I am one—one side, too; on the other, you still have the advantage from that perspective, but I think, in an open process, it would be looking at history that it would show more——

Ms. LOFGREN. Would the gentleman yield on that point?

Mr. MCCARTHY. Sure.

Ms. LOFGREN. This is the reason why I crafted it in this way. And if there are tiny issues, like what day we are going to report or something, that I don't want us to have to meet to make a decision on a comma. On the other hand, if this is something substantive, I expect the Chairman to reach out to us. And I would expect also that the staff would reach out to staff so that we are not called on the Floor to make a decision that we don't really have the background to make; and that if there is any disagreement, that we would then have a formal meeting. So that is what I intend by

this to happen. And I think that if the Chairman would confirm that that is how he intends to proceed, I mean, there would be a big stink if it were other than how I have described it, and I trust the Chairman to operate in that way that is fair.

Mr. GONZALEZ. Let me go ahead and address your concern. When it says consultation, I take it quite seriously and for a lot of reasons. One, I don't have all the answers, and it is wonderful when it is collective. Much of what we have in this particular motion, to be real honest with you, was developed as a result of questioning by members of the minority party at the briefing which—the point is well taken, I can assure you, anything of any import. When I say "consultation," it may require a meeting, but if it is something minor, I still will consult.

And, of course, we have rules, and I am always concerned about running afoul of the rules. To what extent can I informally run something by you that is not totally significant, but it a question and someone is asking us to resolve it, I would like to have some latitude on that. And you all would trust me that if it is of the nature to the degree that I think would require a meeting, I assure you that we can conduct the meetings.

They are not true hearings; we don't have witnesses, subpoenas, testimony that can be called in very short order, so—I can assure you of that. I am not the author of the amendment, but I do believe that it provides to allay any fears that you might have.

There was one other point that I want to make abundantly clear, and that is existent evidence and testing and such. I don't want any of today's conversation that we have had here to be interpreted as this task force identifying any one piece of evidence that may be in existence as being somewhat superior or that everyone would defer to.

I understand that there is a body of evidence out there already that GAO will definitely incorporate. But I don't want anyone to look at the transcript of today's meeting and then deduce somehow that, well, if we just look at what has already been done, we can move forward and it is all ended.

To a certain extent I understand that that evidence is there, it is going to be incorporated, it is part of the analysis. But I anticipate that the concerns expressed by the contestant as to further testing, if GAO and whoever they bring into the picture in the way of additional expertise, determines that it is appropriate, relevant, material, legitimate, then that we would move forward on that basis.

Mr. McCarthy.

Mr. MCCARTHY. Well, I have got to tell you, I am getting frustrated now because I am coming in from a standpoint that, in the end, I want a unanimous decision. That means we work on a commonsense basis. With no undue respect, Mr. Chairman, I don't ever question you not coming to me. You have treated me that way all the way from the very beginning.

But this place runs on rules, and when you look back at something, the rule says you are empowered to do this in the end result. And then I hear from Ms. Lofgren, who said, well, I see the GAO doing what Stanford said. To me, that seems like something predetermined.

I did not want to come to this committee to have something predetermined. So—from that standpoint, I thought I was trying to offer something that could get us to a point that had a unanimous consent, that we are looking at this on that basis; and I just have to be very honest with you that I don't find this to be that. And strictly from the standpoint that we are a small committee, it is 2 to 1, there should never be a fear of meeting, but we should never start a basis with the rules of a disadvantage from that one standpoint. And I just think, from that perspective, I feel very frustrated.

Ms. LOFGREN. Mr. McCarthy, the chairman has just handed me a piece of paper suggesting that we say the task force shall approve. I would accept that as a friendly amendment, but with this caveat.

I don't really know how this is going to work, but if it ends up having to meet to approve commas, or things that are minor, ends up delaying the process, then I am going to suggest that we come back into session and go back to the original motion. Because we want to get this done and we don't want to have a meeting every day for something that doesn't matter; whereas we do want to have a meeting and approve unanimously anything that is substantive.

So with that understanding, I would accept the chairman's suggestion on the change in the motion that would read, "The task force shall approve any testing protocols prior to execution by the GAO," which I think does address the gentleman's issue.

Mr. GONZALEZ. Without objection, the original motion is amended.

Mr. McCarthy, at this point I think we have had a really good-faith discussion all along the way. I am not going to do anything to jeopardize that. I don't think your request is unreasonable.

Obviously, Congresswoman Lofgren is agreeable to that amendment, so the protocol, the final protocol as set out, will require, obviously, a meeting of the task force. Mr. Lungren will be welcome to attend that.

So, with that, do we have any other remarks or comments? We are running 5 minutes late. Otherwise, the motion is on the table.

All in favor, answer aye.

All opposed.

Any further business?

If not, then we stand adjourned. Thank you very much.

[Whereupon, at 11:50 a.m., the committee was adjourned.]